

# ECONOMIC LOSS, THE DUTY OF CARE AND INSURANCE

PROFESSIONAL INDEMNITY FORUM CONFERENCE  
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## Introduction - The Problem

Pure economic loss

- “Financial loss suffered by a Claimant which does not flow from any damage to his own ... property.” - Halsbury’s Laws of England
- Recoverable - in contract
  - but in tort? - floodgates?

Is also ...

- Cost of remedying defect or damage in “thing” Defendant supplied, and the consequences of remedying it.
- The “thing”? - the building
  - the service? - deeds or representations?
- Recoverable - in contract?
  - in negligence? - warranty of design & workmanship

## The Problem - continued

Doesn't include ...

- Loss arising out of damage to other property caused by the thing supplied.

- Financial loss consequential on that damage.

To recover pure economic loss...

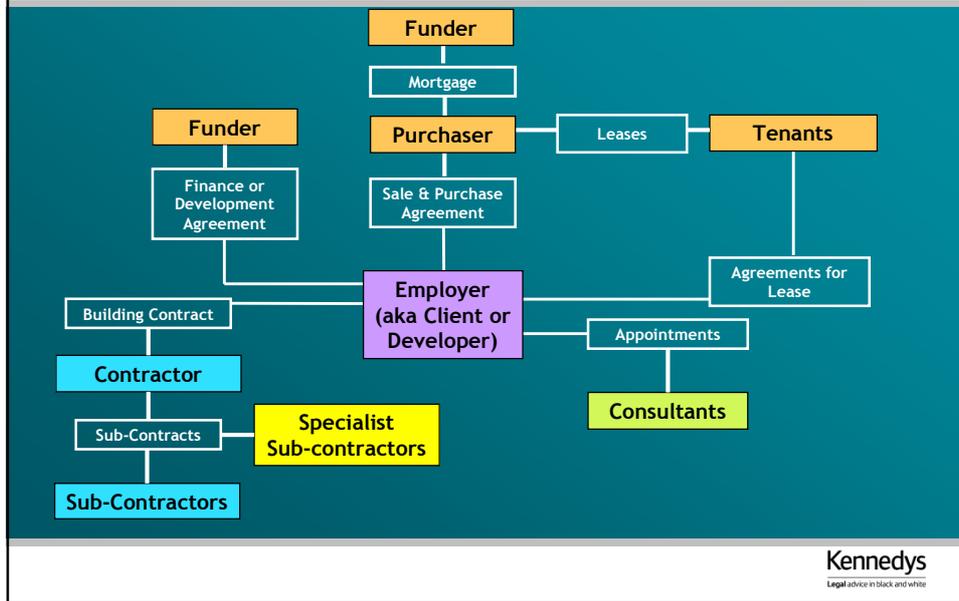
- Defendant must have “*assumed responsibility*” to the Claimant to prevent it suffering such loss.

- Claimant must have relied on the Defendant.

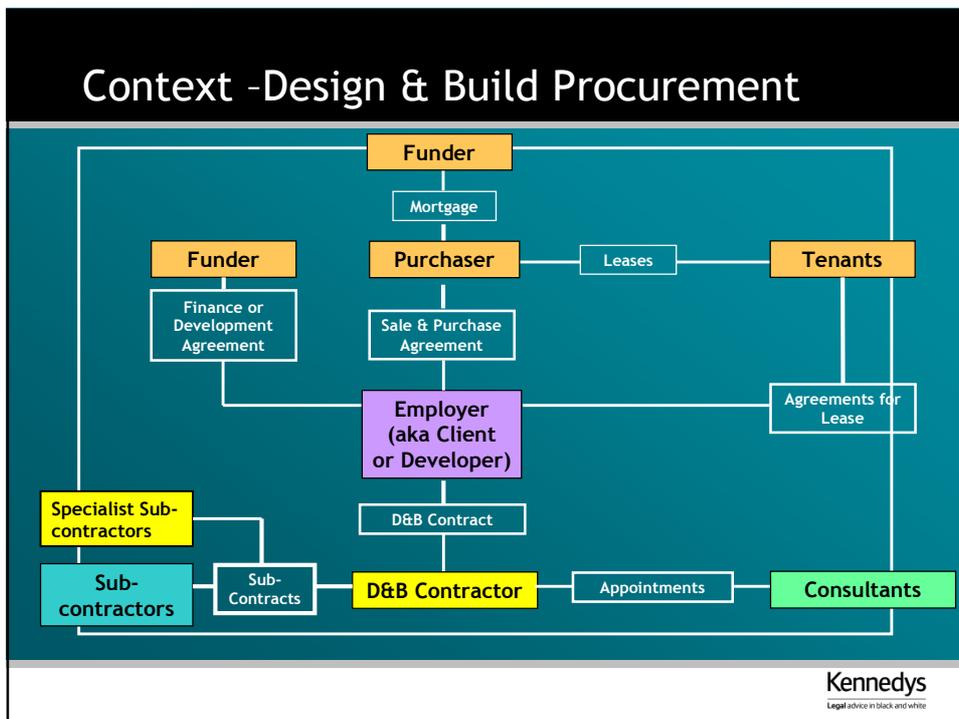
## Introduction - Questions

- Why is tortious liability for “*economic loss*” in construction projects important/relevant?
- How has this shaped the public liability cover available in the construction sector?
- Who owes what duty?
  - Professionals
  - Contractors
  - Design & Build (“*D&B*”) Contractors
  - Specialist Sub-contractors
- Do D&B Contractors and/or Specialist Sub-contractors require both PI and PL Insurance?
- What does the future hold?

## Context - Traditional Procurement



## Context - Design & Build Procurement



## Context

Rise in...

- D&B Contracts
- Specialist Sub-contracts



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## Relevance

Contracts abound, so why look for tortious duties?

Contracting parties...

- Latent damage and limitation
- Contributory negligence
- Contractual liability exclusions

In absence of contract...

- Subsequent purchasers of properties
- Tenants of buildings
- Other parties in contractual chain
  - Insolvency
  - Limitations/exclusions

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## Construction Sector's liability insurance

### Liabilities

- Private - contract
- Public - tort
  - statute

### Insurance

- Public Liability
  - Defective work
  - Damage to “other” property and consequences of that; *Donoghue v Stevenson* duty - *Tesco Stores v Constable* [2008] CA
- Professional Indemnity
  - Defective services
  - Civil liability - professionals
  - Negligence - D&B Contractors, Special Sub-contractors
  - Damage and economic loss, private and public
- Product Liability

## Who can, if negligent, be liable for remedying defects in the building itself, and their consequences?

### Position pre *Robinson v Jones* [2011] CA

- Concurrent duties, absent exclusions/limitations
  - Professionals- certainly
    - *Pirelli v Oscar Faber* [1983] HL
  - Contractors- probably
    - *How Engineering v Southern Insulation* [2010] Akenhead J
  - Specialist sub-contractors- probably
    - *Barclays Bank v Fairclough No's 1 & 2* [1995] CA
  - D&C contractors- probably
    - *Storey v Charles Church* [1995] HHJ Hicks; *Tesco v Costain* [2003] HHJ Seymour; but *Payne v John Setchell* [2002] HHJ Humphrey Lloyd
- Duties to 3<sup>rd</sup> parties
  - Professionals- possibly
    - *Baxall Securities v Sheard* [2002] CA
  - Others - unlikely
    - *Linklaters v Sir Robert McAlpine* [2010]

## Who can, if negligent, be liable for remedying defects in the building itself, and their consequences?

The watershed - *Robinson v Jones* [2011] CA

- First instance
  - Builder owed a concurrent duty of care in tort to protect client from pure economic loss
  - However limitation of liability in contract applied equally in tort
- Court of Appeal
  - Agreed that builder couldn't have a greater liability in tort
  - Disagreed that builder owed client duty of care in tort
- Majority (Jackson LJ and Kay LJ)
  - Professionals usually owe concurrent duty
  - No "*assumption of responsibility*" by builder in "*normal*" situation
  - Implication that contract can "*displace*" tortious obligations
- Stanley Burton LJ
  - Builder/vendor of building never assumes responsibility to client/purchaser for pure economic loss
  - Professional liable for defect; building is "*other*" property that is damaged

## Jackson LJ - November 2011

*"It is perhaps understandable that professional persons are taken to assume responsibility for economic loss to their clients. Typically, they give advice, prepare reports, draw up accounts, produce plans ... They expect their clients and possibly others to act in reliance upon their work product, often with financial ... consequences."*

## Jackson LJ - November 2011 (continued)

“... I see nothing to suggest that the [contractor] “assumed responsibility” to the [client] in the Hedley Byrne sense. [They] entered into a normal contract whereby the [contractor] would complete the construction of a house for the [client] to an agreed specification and the [client] would pay the purchase price. The [contractor’s] warranties of quality were set out and the [client’s] remedies ... were also set out. The parties were not in a professional relationship whereby, for example, the [client] was paying the [contractor] to give advice or to prepare reports or plans upon which the [client] would act.”

## Who can, if negligent, be liable for remedying defects in the building itself, and their consequences?

### Post *Robinson*

#### •Duties to third parties

- *Hunt v Optima* [2014] (Kay, Tomlinson and Clarke LJJs)
  - Inspection and certificates; subsequent purchaser
- *Sainsbury’s v Condek* 2014 (Stuart-Smith J)
  - Employer’s claim against D&B’s engineer

#### •Concurrent duties

- *Greenwich Millenium Village v Essex* [2013] (Coulson J)
  - Employers “claim” against M&E sub-contractor
- *Concurrent Liability, where have things gone wrong?* Jackson LJ’s SCL paper no. 191, February 2015

## Jackson LJ - February 2015

*“(iii) Where are we now? ...*

*The existence of the contract and its terms will form part of the circumstances to be taken into account ... [However] the better view is that the existence of a contract defining the obligations and liabilities of the participants should be a pointer (although not conclusive) against finding parallel duties of care in tort...*

*Commentators have criticised the distinction which emerges ... between the position of (a) building contractors and (b) building professionals... it may be said that every contracting party in every situation ‘assumes responsibility’ to the other party for the performance of his promises. But that would be to stretch the assumption of responsibility test too far ... there is a discernible distinction between those who design ... and those who construct...*

*In my view the rights and liabilities of contracting parties should generally be regulated by the contracts which they have made, not by some amorphous and ever expanding law of tort.”*

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## Who can, if negligent, be liable for remedying defects in the building itself, and their consequences?

### Current position

#### •Duties to third parties

- If subsequently act as certifiers/warrantors? Almost certainly
- For original negligence
  - Professionals - possibly
  - Others - probably not (highly fact sensitive; contractual chain)

#### •Concurrent Duties

- Professionals - yes (but appointment?)
- Contractor - unlikely
- D&B contractor, Specialist Sub-contractor - ???

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## D&B Contractor and Specialist Sub-contractor

### Policy considerations

*“The effect of accepting the respondents’ contention with regard to the scope of the duty of care involved would be, in substance, to create, as between two persons who are not in any contractual relationship with each other, obligations of one of those two persons to the other which are only really appropriate as between persons who do have such a relationship between them ...*

*In the case of sub-contractors such as those concerned in the present case, the position would be that they warranted to the building owner that the flooring, when laid, would be as well designed, as free from defects of any kind and as fit for its contemplated purpose as the exercise of reasonable care could make it. In my view, the imposition of warranties of this kind on one person in favour of another, when there is no contractual relationship between them, is contrary to any sound policy requirement.”*

-Dissenting judgment of Lord Brandon, *Junior Books v Veitchi* [1983] HL page 551

-Quoted with approval in *Bellefield Computer v E Turner* [2000] CA, *D&F Estates v Church Commissioners* [1988] HL

## D&B Contractor and Specialist Sub-contractor

### Assumption of responsibility?

- Contractor in *Robinson* had designed and specified house
- *Storey* and *Tesco* considered to be wrongly decided in *Robinson* by at least Stanley Burton LJ. *Storey* incompatible with *Robinson*
- Unlikely to be in a “professional relationship”
  - No “fees” for design
  - Client unlikely to “act” on design
  - Different commercial drivers
- Position akin to specialist manufacturer?
  - *Nitrigin v Inco* [1992] May J; specialist pipes contract didn’t create *Hedley Byrne* relationship
- Where do you draw the line between design and workmanship?
- No reliance on defective design?

## D&B Contractor and Specialist Sub-contractor

But ...

- Jackson LJ appears undecided

*... In 'design and build' contracts the contractor embraces both functions. He provides professional advice/design. He also carries out work in accordance with his own design - February 2015*

- D&B contractors dual role
- *Fairclough* Nos 1 & 2 not considered in *Robinson*
- Lack of clarity for why a builder differs fundamentally from a professional
- Will Judges agree with Jackson LJ's approach to contracts?
- Lines between *Donoghue* and *Hedley Byrne* liability blurred
- Scope for future confusion

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## Crystal Ball

The future ...

- A continued retreat regarding concurrent liabilities?
- Law reform re limitation and contributory negligence?
- Further appeals, in meantime uncertainty
- Claimants will look for damage to other property?
- Reliance on Stanley Burton LJ's argument?
- Complex Structure Theory reinvented?
- Greater liability for contractor's design element than for work?

In the meantime ...

- D&B Contractors still require professional indemnity insurance
  - Possibly with different terms
  - From different providers?
  - Less Risk?

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